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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA Plaintiff, v. JUAN HERON-SALINAS, Defendant.	Criminal Case No. 07CR2872-JM **GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS TO:** **(1) DISMISS INDICTMENT DUE TO INVALID DEPORTATION;** **(2) GRANT LEAVE TO SUPPLEMENT MOTION AND TO FILE FURTHER MOTIONS** **TOGETHER WITH STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES** Date: January 25, 2008 Time: 11:30 a.m. Court: Hon. Jeffrey T. Miller

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and Nicole Acton Jones, Assistant United States Attorney, and hereby files its Response and Opposition to Defendant's above-captioned motions. Said response and opposition is based upon the files and records of this case together with the attached statement of facts and memorandum of points and authorities.

I

STATEMENT OF THE CASE

On October 17, 2007, a federal grand jury in the Southern District of California returned a one-count Indictment charging defendant Juan Heron-Salinas("Defendant") with Attempted Entry After Deportation, in violation of Title 8, United States Code, Section 1326. On October 30, 2007, Defendant was arraigned on the Indictment and entered a plea of not guilty.

II

STATEMENT OF FACTS

A. Defendant's Apprehension

On October 9, 2007, at about 6:30 a.m., Defendant attempted to enter the United States from Mexico through the San Ysidro Port of Entry. Specifically, Defendant was found, along with three other people, concealed in the trunk of a 2001 Volkswagen Jetta. Defendant was escorted to secondary inspection.

In secondary, Defendant's biographical information and fingerprints were entered into the IAFIS and immigration computer databases, which revealed Defendant's criminal and immigration history. Defendant was then advised of his Miranda rights in the Spanish language. Defendant elected to invoke his right to remain silent. Defendant was also advised of his consular communication rights and he notified a consular officer of his arrest.

B. Defendant's Criminal and Immigration History

On January 18, 2000, Defendant was convicted in Los Angeles Superior Court of Assault with a Firearm on a Person in

violation of California Penal Code § 245(a)(2). Defendant was sentenced to 72 months in custody.

On December 4, 2006, Defendant was convicted in this District of alien smuggling in violation of 8 U.S.C. § 1324. Defendant was sentenced to 18 months in custody

Defendant appeared before an Immigration Judge for a deportation hearing on December 30, 2004 and was physically removed from the United States to Mexico through the Calexico Port of Entry. Defendant was most recently physically removed to Mexico on October 1, 2007 through Pennsylvania following his release from Federal Correctional Institution Gilmer.

III

DEFENDANT'S DEPORTATION WAS VALID BECAUSE HE IS AN AGGRAVATED FELON

The sole basis for Defendant's motion to invalidate his prior order of deportation is that the immigration judge erroneously found him to be removable as an aggravated felon. Defendant's argument is based on his contention that his prior conviction for Assault with a Firearm on a Person, in violation of California Penal Code Section 245(a)(2) is not a "crime of violence" and therefore is not an aggravated felony under 8 U.S.C. § 1101(a)(43).

According to Defendant, a person can be convicted of assault in California based upon merely reckless conduct, but Defendant has not provided a single case where a California court has upheld an assault conviction based upon anything less than intentional conduct. Moreover, as Defendant knows full well (and has utterly failed to address in his motion), even if this

Court were to resort to the modified categorical approach, there is no question that Defendant's conduct, which included "willfully and unlawfully" committing an assault on a person with a firearm and "personally inflict[ing] great bodily injury" upon his victim would satisfy the definition of a crime of violence. See Ex. __.[1/]

Even without regard to the specific facts of Defendant's prior conviction, his motion is without merit. A review of the statutory language and the applicable authority reveals that a conviction under Section 245(a)(2) is categorically a crime of violence.

A. ASSAULT WITH A DEADLY WEAPON IS A CRIME OF VIOLENCE

Under Section 16 of Title 18, a crime of violence is defined as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

As the Ninth Circuit has recently explained, when conducting a categorical analysis to determine whether a state offense

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[1/]Defendant's lack of candor on this point is particularly disturbing considering that Defendant is in possession of the PSR created in the course of his 2006 alien smuggling conviction revealing the details of this assault, which include Defendant shooting and injuring his victim (who was walking away from him at the time) with a 9mm handgun. Defendant's explanation for his conduct was that he "shot a black man who was bothering me in my house." See Ex. 1 (excerpt from 2006 PSR). This PSR, of course, cannot be used in a modified categorical analysis, but its existence underscores the baseless nature of this motion. In the event the Court determines a modified categorical approach is required, the Government is currently attempting to obtain additional supporting documents.

falls within the federal definition of a crime, the question is "whether 'the elements of the offense are of the type that would justify its inclusion.'" United States v. Carson, 486 F.3d 618, 619-20 (9th Cir. 2007), quoting James v. United States, — U.S. —, 127 S.Ct. 1586, 1594 (2007). Citing to recent Supreme Court authority, the Ninth Circuit held that courts

> must not conjure up some scenario, however improbable, whereby a defendant might be convicted under the statute in question even though he did not commit an act encompassed by the federal provision. Rather, we must find "a realistic probability, not a theoretical possibility," that this might happen. Gonzales v. Duenas-Alvarez, — U.S. —, 127 S.Ct. 815, 822 (2007). In other words, "the proper inquiry is whether the conduct encompassed by the elements of the offense, *in the ordinary case*," would satisfy the requirements of [the federal provision.] James, 127 S.Ct. at 1597 (emphasis added).

Id. at 620 (emphasis in original).

Defendant in this case is doing exactly what the Supreme Court and the Ninth Circuit counseled against and makes the strained argument that a quintessential crime of violence – assault with a firearm – is not a crime of violence for purposes of the immigration code. Defendant is wrong.

1. Section 245(a)(2) Has as an Element "the Use, Attempted Use, or Threatened Use of Physical Force Against the Person or Property of Another"

Under Carson, the Court must determine whether the conduct encompassed by the elements of Defendant's crime "in the ordinary case" satisfy the definition of a crime of violence under Section 16. Carson, 486 F.3d at 620. The conviction at issue in this case is Defendant's conviction for assault with a firearm on a person. See Cal. Penal Code § 245(a)(2). California Penal Code Section 245(a)(2) – which falls under the

heading "Assault with deadly weapon or force likely to produce great bodily injury; punishment" - provides as follows:

> (a)(2) Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars ($10,000) and imprisonment.

Id. To be convicted of a violation of section 245(a)(2), the following two elements must be met: (1) a person was assaulted; and (2) the assault was committed with a firearm. See Cal. Jury Instr. Crim. 9.02. The use notes to this instruction provide that Cal. Jury Instr. Crim. 9.00, which sets out the elements of an assault, "must be given along with this instruction in order to provide a definition of assault." Id.

California's assault statute defines assault as "an unlawful attempt, coupled with present ability, to commit a violent injury on the person of another." See Cal. Penal Code § 240. To be guilty of an assault under Section 240, the following elements must be proven:

> 1. A person **willfully** [and unlawfully] committed an act which by its nature would probably and directly result in the **application of physical force** on another person;
>
> 2. The person committing the act was **aware** of facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act that **physical force would be applied** to another person; and
>
> 3. At the time the act was committed, the person committing the act had the present ability to apply physical force to the person of another. **The word "willfully" means that the person committing the act did so intentionally.**[2/] However, an

[2/] California's willfully/intentionally *mens rea* requirement (continued...)

> assault does not require an intent to cause injury to another person, or an actual awareness of the risk that injury might occur to another person. To constitute an assault, it is not necessary that any actual injury be inflicted. However, if an injury is inflicted it may be considered in connection with other evidence in determining whether an assault was committed [and, if so, the nature of the assault].

Cal. Jury Instr. Crim. 9.00 (emphasis added). The notes to Cal. Jury Instr. Crim. 9.00 further provide that this instruction "should be given in all assault prosecutions." Cal. Jury Instr. Crim. 9.00.

Given the above, it is clear that *any* form of assault as defined in Cal. Penal Code § 240 must be regarded as a "crime of violence" because assault under California law "requires at least the attempted application of some physical force." United States v. Bolanos-Hernandez, 492 F.3d 1140 (9th Cir. 2007). In Bolanos-Hernandez, the Court was considering whether assault to commit rape, in violation of Cal. Penal Code §§ 220 and 261(a)(2), constituted a forcible sex offense under USSG § 2L1.2. In doing so, the Court observed that, as with assault with a firearm under section 245(a)(2), "a conviction for assault with intent to commit rape . . . requires proof of the elements of attempted rape plus those of assault." Bolanos-Hernandez, 492 F.3d at 1146.

[2/](...continued)
is in stark contrast to the Arizona assault statute at issue in Fernandez-Ruiz v. Gonzales, 466 F.3d 1121 (9th Cir. 2006), which explicitly covered "intentionally, knowingly or *recklessly* causing any physical injury to another person." Id. at 1125 (emphasis in original). In addition, the Arizona statute focuses on causing injury, while the California statute, like Section 16, focuses on the use of physical force.

The Court then set out the three elements of assault from Cal. Jury Instr. Crim. 9.00, which are listed above. After doing so, the Court concluded: "Each of [the elements of assault contained in Cal. Jury Instr. Crim. 9.00] specifically discusses the application of actual or attempted physical force on the victim. Assault with intent to commit rape therefore requires at least the attempted application of some physical force." Id. at 1146-47 (emphasis added). Using the same reasoning applied in Bolanos-Hernandez, the Court should conclude that assault with a firearm "requires at least the attempted application of some physical force," and, as a result, constitutes a crime of violence under Section 16(a). Bolanos-Hernandez, 492 F.3d at 1147.

Considering that the Taylor categorical analysis is predicated upon an examination of the elements of the offense in question, it is telling that a discussion of the elements of assault and assault with a deadly weapon are nowhere to be found in Defendant's brief. This is not surprising given that, as described above, the elements of assault under California law are replete with references to the language required by Section 16, i.e. "willing"/"intentional" acts, the natural result of which would be "the application of physical force" on another person. Cal. Jury Instr. Crim. 9.00.

Rather than focus on the elements of the crime of assault, Defendant's entire brief is based on the one thing California courts do not require: proof that the individual intended to cause or knew he was likely to cause *injury* to another. [Mot. at 3 (assault "does not require a specific intent to injure the

victim); ("assault does not require a subjective awareness of the risk that injury might occur");id. at 6 (assault with a deadly weapon "does not require specific intent to cause injury, or even a subjective awareness that such injury might occur, but only a 'conscious disregard' or a 'reckless disregard' of the probable consequences"). This is much ado about nothing because Section 16 does not require that the act of violence result in "injury;" rather, the focus is on whether the offense requires the use, attempted use, or threatened use of physical force against another person. See 18 U.S.C. § 16(a). California's assault statutes, as discussed above, easily satisfy this requirement.

2. Section 245(a)(2), "by its nature, involves a substantial risk that physical force against the person . . .may be used in the course of committing the offense"

Given the elements required to prove a violation of Section 245(a)(2), it is impossible to imagine how an individual (1) could commit the offense of an assault upon the person of another (i.e. "an unlawful attempt, coupled with present ability, to commit a violent injury on the person of another", Cal. Penal Code § 240) and (2) in the course of that assault use a deadly weapon (i.e. a firearm, Cal. Penal Code § 245(a)(2)) without creating a substantial risk of using physical force against a person.

Nor has Defendant offered any such scenario based on either California caselaw or his own crime. In fact, the elements of assault directly answer this very question by describing the act of assault as being "an act *which by its nature* would probably and directly result in the application of physical force on

another person." Cal. Jury Inst. 9.00 (1) (emphasis added). It goes without saying that if a standard assault naturally involves a substantial risk of force or injury to person, an assault *with a firearm* would involve an even more substantial risk.

Defendant attempts to argue otherwise by reference to Lara-Cazares v. Gonzalez, 408 F.3d 1217 (9th Cir. 2005). [Motion at 5.] Defendant's citation, however, is taken out of context. In Lara-Cazares, the Court held that gross vehicular manslaughter while intoxicated was not a crime of violence. The Court explained that the "substantial risk" required by 16(b) requires a connection between the potential use of force and the offense itself. Id. at 1220. The Court found that "[i]n no 'ordinary or natural' sense can it be said that a person risks having to 'use' force against another person in the course of operating a vehicle while intoxicated and causing injury." Id. In other words, a substantial risk of an *accidental* application of force, as a by-product of the offense, is not sufficient. The risk must be of an *intentional* use of force as part of the offense itself.

Under this analysis, both assault and assault with a deadly weapon clearly qualify under Section 16(b) because both offenses require a willful (defined as intentional) act "which by its nature" creates a substantial risk that physical force will be applied as an essential element of the offense. Lara-Cazares, which is focused on accidental applications of force, is inapposite.

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3. Leocal and Fernandez-Ruiz do not compel a different result

Defendant contends that despite the fact that the plain language of California's assault statute satisfies both Section 16(a) and 16(b), assault is not a crime of violence. Defendant's argument is based on a misunderstanding (if not a misrepresentation) of the applicable authority.

a. Leocal and Fernandez-Ruiz only require intentional conduct

To focus the discussion, the Government does not dispute that, under the current state of the law, recklessness and negligence are insufficient *mens rea* to constitute a crime of violence, or that qualifying crimes must involve the "intentional" use or threatened use of force. See Leocal v. Ashcroft, 543 U.S. 1, 10-11 (2004) (using force accidently or negligently is not a crime of violence) and Fernandez-Ruiz v. Gonzales, 466 F.3d 1121, 1130, 1132 (9th Cir. 2006) (extending Leocal to crimes involving the recklessness and gross negligence). The Government does, however, dispute Defendant's contention that California's assault statutes do not satisfy Leocal and Fernandez-Ruiz.

At most, Leocal is consistent with the notion that the required use or threatened use of force for a crime of violence should be "intentional," as opposed to "accidental." In describing offenses that qualify, Leocal said "the critical aspect" of 18 U.S.C. § 16(a) is that a crime of violence requires the "active employment" of force against the person or property of another. 543 U.S. at 9. By way of contrast, the Court noted that one who "actively employs" force against

another person cannot naturally be said to do so "by accident." Id. Insofar as "intentional" is an accepted antonym of "accidental",[3/] one can draw support from this language in Leocal for the idea that a crime of violence entails "intentional" conduct.

As for Fernandez-Ruiz, in stating its holding and describing a "crime of violence" under 18 U.S.C. § 16, the Ninth Circuit simply – and repeatedly – used the adjective "intentional." See, e.g., 466 F.3d at 1123 ("Because the relevant Arizona statute permits conviction when a defendant recklessly but unintentionally causes physical injury to another, and because the petitioner's documents of conviction do not prove he intentionally used force against another, we conclude the federal statute does not apply."); id. at 1130 ("But this subjective awareness of possible injury is not the same as the intentional use of physical force against the person of another"); id. at 1132 ("The bedrock principle of Leocal is that to constitute a federal crime of violence an offense must involve the intentional use of force against the person or property of another.")

b. California Courts Require Intentional Conduct to Support an Assault Conviction

California Penal Code § 245(a)(2) meets the definition of "crime of violence" that emerges from Leocal and Fernandez-Ruiz because the crime requires an "intentional" use, attempted use or threatened use of force on the person of another. The model California jury instructions state as much. Cal. Jury Instr.

[3/] See http://thesaurus.reference.com/browse/accidental

Crim. 9.00 (assault - defined) (listing element that one act "willfully" and providing, "The word 'willfully' means that the person committing the act did so intentionally."). The intermediate California courts have held as much. See, e.g., People v. Griggs, 216 Cal. App. 3d 734, 740 (Cal. Ct. App. 1989) ("The requisite intent for the commission of an assault with a deadly weapon is the intent to commit battery."). So has the California Supreme Court. See People v. Colantuono, 7 Cal. 4th 206, 214 (Cal. 1994) (to be convicted of assault with deadly weapon, "the defendant must intentionally engage in conduct that will likely produce injurious consequences"); id. at 217 n.8 ("to commit an assault one must willfully attempt a violent act against another").

By the same token, California courts have explicitly held that "reckless" or "negligent" conduct is insufficient to sustain a conviction for assault with a deadly weapon. See People v. Williams, 26 Cal. 4th 779, 788 (Cal. 2001) ("mere recklessness or criminal negligence is still not enough ... because a jury cannot find a defendant guilty of assault based on facts he should have known but did not know"); People v. Rocha, 3 Cal. 3d 893, 898 (Cal. 1971) (after noting that earlier cases had held that a Penal Code § 245 offense "could be predicated upon mere reckless conduct," adding that, in People v. Carmen, 36 Cal. 2d 768 (Cal. 1951), "we disapproved those cases and held that mere reckless conduct alone cannot constitute an assault"); People v. Smith, 57 Cal. App. 4th 1470, 1480 (Cal. Ct. App. 1997) ("It follows that criminal negligence

is not sufficient to establish an assault.")[4]; People v. Brown, 212 Cal. App. 3d 1409, 1419-20 (Cal. Ct. App. 1989) ("Intent to frighten or mere reckless conduct is insufficient."; "Pointing the loaded gun in [the victim's] direction and then firing it off can clearly be inferred as reflecting an intent to injure and not merely an intent to frighten."), disapproved on other grounds by People v. Haves, 52 Cal. 3d 577, 628 n.10 (Cal. 1990).[5]

Oddly, Defendant cites to some of these cases to support his argument that, under California law, assault and assault with a deadly weapon only require a *mens rea* of recklessness or conscious disregard. [Mot. at 3, 4, and 6, citing Williams; id. at 4, 6 citing Griggs]. Defendant accomplishes this by avoiding the portions of these cases that expressly disavow the recklessness standard and in so doing misrepresents the holding of these cases.

For example, Defendant cites Williams for the [uncontested] proposition that "assault does not require a specific intent to cause injury or a subjective awareness of the risk that an

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[4]In Smith, the court reversed an assault with a deadly weapon conviction where the defendant's vehicle struck a police officer as the defendant was attempting to drive through a police barricade. 576 Cal. App. 4th at 1475. The court found the jury instructions were erroneous because, in conjunction with the court's responses to jury questions, the instructions allowed the jury convict simply upon a showing that the defendant intended to move his vehicle forward (criminal negligence/recklessness) rather than the required intent to commit a battery. Id. at 1478-79.

[5]The California Supreme Court has even gone so far as to provide the following illustrative hypothetical: "Thus, a person who recklessly exhibits a weapon in a threatening manner which accidentally discharges injuring another does not commit an assault with a deadly weapon, but would be guilty of violating Penal Code section 417." See Rocha, 3 Cal. 3d at 898 n.5.

injury might occur." [Mot. at 3, 6.] Defendant fails, however, to cite the very next sentence holding that an assault conviction "requires an *intentional act* and *actual knowledge* of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." 26 Cal.4th at 790 (emphasis added).

Not only does Defendant misrepresent the holding in Williams, Defendant fails to set forth the facts that provide context for that holding. The defendant in Williams had loaded and then fired a shotgun directly into the passenger-side wheel well of his girlfriend's ex-husband's truck. The ex-husband was approximately a foot and a half away from the vehicle and his minor sons were also in the vicinity at the time of the shooting. 26 Cal. 4th at 782-83. These facts clearly show that, regardless of whether the defendant had intended to cause injury, he had engaged in an intentional act of violence.

Defendant's selective citation to Griggs is equally unavailing. Griggs involved a defendant who fired at least two shots into a crowd of people leaving a concert. 216 Cal. App. 3d at 737. The question addressed by Griggs was whether an assault with a deadly weapon requires "an identifiable and named victim." Id. at 740.

The court in Griggs explained that the requisite intent for an assault with a deadly weapon is "intent to commit a battery." Id. As to the identity of the victim, the court concluded that "all that is necessary is that there is a victim; the characteristics of the victim are not critical elements of the offense. The law is seeking to punish the reckless disregard of

human life, and what needs to be shown is that a human life was threatened in the manner proscribed in sections 245 and 240." Id. at 742. In context, it is clear that court's use of the word "reckless" was in reference to the consequences (i.e. an unintended victim) of the defendant's *intentional* act of violence.

As for the citation to People v. Lathus, 35 Cal. App. 3d 466, 469-70 (Cal. Ct. App. 1973), Defendant conveniently ignores that the court began by reaffirming that "[r]eckless conduct alone does not constitute a sufficient basis for assault or battery even if the assault results in an injury to another." Id. at 469. Defendant also partially cites the following language, which the Government will provide in full:

> However, when an act inherently dangerous to others is committed with a conscious disregard of human life and safety, the act transcends recklessness, and the intent to commit the battery is presumed; the law cannot tolerate a deliberate and conscious disregard of human safety. Thus, if one deliberately employs a lethal weapon, such as a gun, with the actual or presumptive knowledge that if utilized in the manner in which it is being used the infliction of serious bodily injury to another is very likely to occur, he is presumed to have intended the natural consequences of his deliberate act.[6/]

Id.

In People v. Cotton, 113 Cal. App. 3d 294 (Cal. Ct. App. 1980), the defendant had collided with another vehicle as he was attempting to evade police and was convicted of assault with a deadly weapon. On appeal, the state relied upon the above

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[6/] In Colantuono, the court explained that the above language from Lathus was made in the context of determining the sufficiency of the evidence. 7 Cal. 4th at 219. The court further cautioned that such language should not be used as a jury instruction because "intent always remains an issue of fact" and the requisite intent cannot be presumed. Id. at 221.

language from Lathus to support the trial court's determination that even though the defendant had not intended to hit anyone while trying to escape, "the whole course of defendant's reckless driving" supplied the requisite intent to commit a battery. Id. at 302-303. The court in Cotton found that language from Lathus was not only dicta, but that the language must be read in context. Id. at 302.

Thus, the language defendant cites must read in light of the facts in Lathus: a defendant who "fired several pistol shots from a moving vehicle at a car parked on the shoulder of the road", (resulting in injury to a person standing next to the car) and the issue before the court: whether the state was required to prove that the defendant had specifically intended to shoot someone. The court in Cotton easily distinguished Lathus and reversed the defendant's conviction for assault with a deadly weapon after finding that the defendant's conduct amounted to only reckless driving. Id. at 306.

As the California Supreme Court has explained and the above decisions illustrate, the focus is properly "on the violent-injury-producing nature of the defendant's acts, rather than on a separate and independent intention to cause such injury." Williams, Cal.4th at 785, quoting Colantuono, 7 Cal.4th at 215. Instead, "[t]he pivotal question is whether the defendant intended to commit an act likely to result in such physical force, not whether he or she intended a specific harm." Id., quoting Colantuono, 7 Cal.4th at 218. Indeed, Fernandez-Ruiz specifically held that "subjective awareness of possible injury is not the same as the intentional use of physical force against

the person of another." 466 F.3d at 1130. This statement makes clear that the focus of the analysis is on the defendant's *conduct* not the consequences of that conduct.

A review of the statutory language, the elements and the relevant caselaw establishes that an assault under California law clearly requires an intentional act involving the use, attempted use or threatened use of force, or at least an intentional act that by its nature, involves a substantial risk that physical force may be used against a person. Accordingly, such an offense is a crime of violence.

c. General intent crimes can qualify as crimes of violence

Defendant implies that only specific intent crimes satisfy the *mens rea* requirement for a crime of violence. [Mot. at 3, 6.] The phrase "specific intent" appears nowhere in Leocal. Nor did the Supreme Court hold or suggest, by other language, that a crime must have specific intent to be a "crime of violence" under federal law, or that general intent offenses can never qualify.

Even though assault with a deadly weapon in California is a general intent crime, as discussed above, it still requires "intentional" conduct within the meaning of Leocal. United States v. Salazar-Gonzalez, 458 F.3d 851, 855 (9th Cir. 2006) (even if he need not know that his actions are illegal, a person who acts with general intent must still "intend to perform the underlying prohibited action"); United States v. Vasarajs, 908 F.2d 443, 447 n.7 (9th Cir. 1990) ("a general intent requirement" requires one to act "intentionally, as opposed to accidentally"). Accordingly, Leocal is entirely

consistent with the conclusion that a general intent crime can amount to a "crime of violence."

Nor does Fernandez-Ruiz limit crimes of violence to specific intent crimes. In fact, Fernandez-Ruiz expressly recognized that general intent crimes can come within a "crime of violence."

In discussing legislative history of the Comprehensive Crime Control Act of 1984 (which gave rise to 18 U.S.C. § 16), the majority noted that a Senate report attached to the bill cited "battery" at 18 U.S.C. § 113(d) (1976) as an example of a crime of violence within the meaning of 18 U.S.C. § 16(a). Fernandez-Ruiz, 466 F.3d at 1131 n.11 (citing Sen. Rep. No. 98-225, at 307 & n.12 (1983)). In finding that this reference did not support the dissent's contention that recklessness was a sufficient *mens rea* for a "crime of violence," the majority expressly distinguished 18 U.S.C. § 113(d) as a general intent crime, and equated the general intent required by the statute with the kind of "intentional" conduct required for a "crime of violence":

> Yet, at least at the time of § 16's enactment, § 113(d) was a "general intent" crime. See United States v. Knife, 592 F.2d 472, 481-82 & n.12 (8th Cir. 1979) ("The element of intent in § 113(f)" - defined as an assault under § 113(d) that results in serious bodily injury - "is satisfied if the general intent to commit the acts of assault arose when [defendant] initially approached [the victim]."); United States v. Martin, 536 F.2d 535, 535-36 (2d Cir. 1976) (per curiam) (finding the mental element of § 113(d) to be adequately proven where "the magistrate found an intent to strike and to scuffle"). Both these cases involve facts showing an intent to strike the victim, not merely the creation of such risk. We therefore doubt that "general intent" under § 113(d) includes reckless conduct, and find the dissent's argument from legislative history unconvincing.

Fernandez-Ruiz, 466 F.3d at 1131 n.11. As such, contrary to Defendant's suggestion, Fernandez-Ruiz actually supports a finding that a general intent crime can satisfy the categorical definition of a "crime of violence."

B. DEFENDANT'S DEPORTATION WAS VALID

Defendant's entire motion is premised upon his contention that his removal order was fundamentally unfair. [Mot. At 3.] Defendant argues that the immigration judge erroneously determined that his prior conviction was an aggravated felony, and therefore, erroneously advised him that he is ineligible for discretionary relief. As discussed above, Defendant's conviction for assault with a firearm on a person is a categorical crime of violence. Thus, the immigration judge properly advised Defendant that he was ineligible for relief from deportation and the resulting order of deportation is valid. Defendant's motion to invalidate his deportation should be dismissed.

IV

CONCLUSION

For the foregoing reasons, the Government respectfully requests that Defendant's motion be denied.

DATED: January 18, 2008.

Respectfully Submitted,

KAREN P. HEWITT
United States Attorney

/s/ ***Nicole Acton Jones***

NICOLE ACTON JONES
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JUAN HERON-SALINAS, Defendant.	Criminal Case No. 07CR2872-JM CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, NICOLE ACTON JONES, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **GOVERNMENT'S RESPONSE AND OPPOSITION** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Jennifer Coon, Federal Defenders of San Diego, Inc.

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

None

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 18, 2008.

/s/ ***Nicole Acton Jones***
NICOLE ACTON JONES
Assistant U.S. Attorney